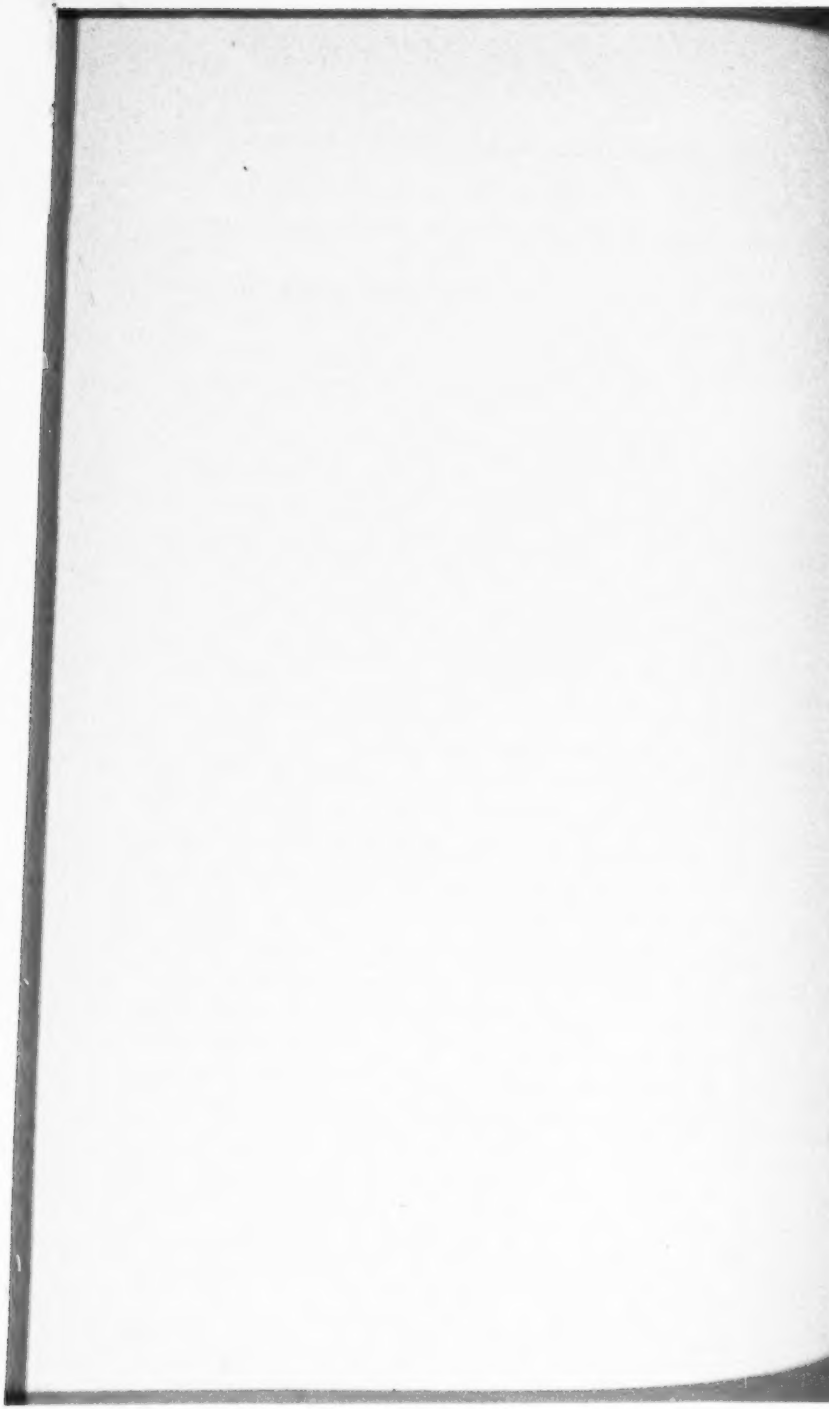

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No. 276.

Brief of Greene v. Northern Assurance Co.
for Petitioner

Office Supreme Court U.S.
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Supreme Court of the United States.

Filed Oct. 5, 1900.

October Term, 1900.

No. 276.

NORTHERN ASSURANCE COMPANY OF LONDON, ENGLAND, PETITIONER,

v.

GRAND VIEW BUILDING ASSOCIATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF AND ARGUMENT OF PETITIONER.

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GRAND VIEW BUILDING ASSOCIATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Brief and Argument of Petitioner.

STATEMENT OF THE CASE.

A policy of fire insurance contained the following stipulation:

"No officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any

privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

Did the knowledge, acquired prior to the issuance and delivery of the policy containing the stipulation above quoted, of the company's recording agent, whose powers were limited to the acceptance of risks, the issuance of policies, and the collection of premiums therefor, of other insurance then existing upon the insured property, but not consented to either by indorsement upon the policy, or by agreement between the insured and the company's agent, and *which knowledge* was not communicated to the company, *constitute a waiver* of the condition of the policy providing: "This entire policy unless otherwise provided by agreement indorsed hereon or added hereto shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy;" *or estop* the company to insist after a fire that its policy was void from the beginning, because of such other insurance not consented to in writing indorsed thereon?

Can a judgment for plaintiff upon a special verdict which is silent upon a fact essential to recovery be sustained?

THE FACTS.

This suit was originally brought by the Grand View Building Association, a corporation created under the laws of Nebraska, and hereinafter called the insured, against petitioner, a corporation created under the laws of the Kingdom of Great Britain and Ireland, in the district court of Lancaster county, Nebraska, to recover upon a policy of insurance issued by petitioner, who removed the case to the United States circuit court for the district of Nebraska, where, in due course, it was tried. The facts upon which

this cause must be here reviewed are set forth in the special findings of the jury, (18, 19), in substance as follows:

1. Petitioner issued to insured the policy of fire insurance in suit.

2. The insured property was burned on or about June 1, 1898.

3. Proofs of loss were furnished about July 26, 1898.

4. The policy contains the provisions set forth in the opening paragraph of this brief.

5. There was, at the time of the issuance of the policy in suit, other insurance for $1,500 upon the insured property, in the Firemen's Fund Insurance Company.

6. A. D. Borgelt was recording agent of petitioner at Lincoln, Nebraska, with authority from petitioner to countersign and issue its policies and accept fire insurance risks in its behalf, and collect and receive premiums therefor, and issued the policy sued on as such agent.

7. Borgelt knew when the policy in suit was issued and delivered to insured, of the other insurance upon the insured property, which was issued prior to the date of the policy in suit, and such fact was communicated to Borgelt by or on behalf of the insured.

(This finding was upon conflicting testimony; Borgelt denies any knowledge until after the fire of the other insurance.)

8. The actual cash value of the insured property burned was $4,140.00.

9. Consent to the concurrent insurance was not indorsed on the policy in suit.

10. Petitioner, on August 4, 1898, tendered $33.75 in return of the premium paid upon the policy in suit, which was not accepted by the insured.

11. The policy in suit contained a provision that the

petitioner should not be liable thereunder for more than the proportion the amount insured should bear to the whole insurance.

12. The whole amount of insurance on the insured property at the time of the loss was $4,000.00.

At the close of all the evidence, "the defendant (petitioner) thereupon moved the court to instruct the jury to return a verdict for the defendant, which motion was overruled, and defendant excepted." (26.)

By reference to the instructions to the jury (26), it will be observed that the only questions submitted to them were as to the facts upon which findings seven and eight are based, that is, whether petitioner's agent knew of the previous insurance at the time he issued the policy in suit, and the actual cash value of the property destroyed. When the special verdict as above summarized was returned into court, each party moved for a judgment upon the findings. (19, 20.) The motion of petitioner was overruled, and it excepted; insured's motion was sustained, and judgment rendered in its favor. (20, 21). Thereupon, afterwards, and by stipulation, a bill of exceptions was settled and filed, and petitioner sued out a writ of error to the United States circuit court of appeals for the eighth circuit, assigning (32) the following

Specifications of Error:

"1. The court erred in overruling the defendant's motion at the close of all evidence for an instruction to the jury to return a verdict in favor of defendant.

2. The court erred in overruling the motion of the defendant for judgment upon the findings of the jury.

3. The court erred in sustaining the motion of the plaintiff for judgment upon the findings of the jury.

4. The court erred in rendering judgment in favor of the plaintiff and against the defendant."

The cause was orally argued and submitted to the cir-

cuit court of appeals of the eighth circuit, on December 11, 1899, and by an opinion filed March 26, 1900, (38), Circuit Judge SANBORN dissenting (43), the judgment against petitioner was affirmed, and the case brought to this court on a writ of certiorari. (49.) The case is reported 101 Fed., 77.

ARGUMENT.

The issues between the parties to this record are sharply stated in the opening paragraph of this brief. If written agreements may be superseded by the parol negotiations which precede and induce them: if one who already has insurance can accept another policy of insurance which does not consent to other insurance, and which in terms is void in case of other insurance not consented to in writing indorsed thereon, without examination to see whether it consents to concurrent insurance: and when a fire occurs *go into a court of law*, without asking for a reformation of the policy upon which he brings suit, and by parol evidence vary the terms of the written contract which he accepted and put among his papers, and thus accomplish the legally impossible feat of establishing a waiver of the provision of his policy which defeats his recovery, by mere proof that the company's agent knew previous to the execution and delivery of the contract, of the fact which constituted a breach of the condition of the policy, viz: the existence of other insurance not consented to in writing indorsed on the policy, without even an attempt to prove any agreement with respect thereto, save that set forth in the policy itself: if the rule of evidence that a written contract cannot be varied by parol is to be abrogated: if this court shall reverse one of its own decisions exactly in point, announced by Mr. Justice STORY and concurred in by a unanimous court: if a judgment for a plaintiff based upon special findings of a jury, silent with respect to a matter essential to plaintiff's recov-

ery can be upheld: then, and not otherwise, can the opinion and judgment of the circuit court of appeals of the eighth circuit be sustained.

The propositions stated oppose "the established rule that written contracts shall prevail over the previous oral negotiations from which they result," and such attempts to abrogate the rule, the circuit court of appeals of the eighth circuit, in *New York Life Ins. Co. v. McMaster* 87 Fed. 63, 69, say, have been repeatedly presented to and have "repeatedly received the condemnation of this and other courts."

This proceeding did not even take the form of an appeal to the conscience of the court to reform the contract upon which the suit is brought, but in the severe language of JUDGE SANBORN in the case cited: "It is a bald attempt to supersede written agreements with the parol negotiations which preceded and induced them."

The decision sought to be reversed chiefly rests upon the previous decision of the circuit court of appeals of the eighth circuit in *Firemen's Fund Insurance Company v. Norwood*, 32 U. S. App., 490, 69 Fed., 71; decisions of the sixth and ninth circuits which in terms follow the *Norwood* case are also cited. These will be referred to hereinafter.

Reference is also made to the fact that the ruling of the supreme court of Nebraska, in *Home Fire Ins. Co. v. Hammang*, 44 Neb., 566, and other cases, is in harmony with the majority opinion.

No wiser bit of congressional legislation is to be found than that which permits insurance companies created under the laws of other states and countries, to remove to the federal courts suits against them involving the jurisdictional amount, from state courts like those of Nebraska, whose conception of an insurance policy is that it is a promissory note payable in case of fire; and it was to avoid a decision

of this case agreeably to the rule of the supreme court of Nebraska in the case cited, which in terms refuses adherence in several points to doctrines firmly established by this and other courts, and to secure its decision in conformity with the principles declared in *Carpenter v. Providence-Washington Insurance Company*, 16 Pet., 495, that the case was removed from the state court.

Carpenter v. Providence—Washington Insurance Co.

Circuit Judge SANBORN in his dissent from the majority opinion in the case at bar (43), states the conflict of decisions and the pith of the decision in the *Carpenter* case as follows:

"The question which this case presents has long been the subject of conflicting decisions. In *Carpenter v. Providence-Washington Ins. Co.*, 16 Pet., 495, 496, 511, the policy contained this stipulation: 'And provided further, that in case the insured shall have already any other insurance on the property hereby insured, not notified to this corporation, and mentioned in or indorsed upon the policy, then this insurance shall be void and of no effect.' There was other insurance upon the property at the time this policy was issued. Mr. Justice STORY expressed the unanimous opinion of the supreme court upon the question in controversy in this case in these words:

'The third instruction prayed the court to instruct the jury that if the Washington Insurance company had notice, in fact, of the existence of the policy in the American office, that 'was, in law, a compliance with the terms of the policy.' The court refused to give the instruction as prayed; but instructed the jury, that at law, whatever might be the case in equity, mere parol notice of such insurance was not, of itself, sufficient to comply with the requirements of the policy declared on; but that it was necessary, in case of any such prior policy, that the same should not only be notified to the company, but shou'd be mentioned in or indorsed upon the policy;

otherwise, the insurance was to be void and of no effect. We think this instruction was perfectly correct. It merely expresses the very language and sense of the stipulation of the policy; and it can never be properly said, that the stipulation in the policy is complied with, when there has been no such mention or indorsement as it positively requires, and without which it declares the policy shall henceforth be void and of no effect.'

This decision was rendered in 1842, has never been overruled, and in 1897 the circuit court of appeals for the seventh circuit reached the same conclusion. *Union National Bank v. German Ins. Co.*, 34 U. S. App., 397, 402, 18 C. C. A., 203, 206, 71 Fed. Rep., 473, 476; *United Firemen's Ins. Co. v. Thomas*, 53 U. S. App., 517, 521, 27 C. C. A. 42, 44, 82 Fed. Rep., 406, 408.

A careful reading of the cases upon both sides of the question has forced my mind to the conclusion that the supreme court and the circuit court of appeals for the seventh circuit are right and for the following reasons:"

(Here follows a statement at length of Judge SANBORN'S views.)

The reason why many of the provisions of insurance policies are placed therein is thus stated by Mr. Justice STORY in the *Carpenter* case.

"Underwriters do not rely so much upon the principles (good faith and integrity) as upon the interest (financial) of the assured."

After a review of other considerations which are no less potent now than fifty years ago, the learned justice remarks:

"But, be these considerations as they may, we see no reason why, as these clauses are a known part of the stipulations of the policy, they ought not to receive a fair and reasonable interpretation according to their terms and obvious import. The insured has no right to complain, for he assents to comply with all the stipulations on his side, in order to entitle himself to the benefits of the contract, which, upon reason or principle, he has no

right to ask the court to dispense with the performance of his own part of the agreement, and yet to bind the other party to obligations which, but for those stipulations, would not have been entered into."

The opinion further recites:

"The questions under our consideration are questions of general commercial law, and depend upon the construction of a contract of insurance, which is by no means local in its character, or regulated by any local policy or customs. Whatever respect, therefore, the decisions of state tribunals may have on such a subject, and they are certainly entitled to great respect, they cannot conclude the judgment of this court. On the contrary, we are bound to interpret this instrument according to our own opinion of its true intent and objects, aided by all the lights which can be obtained from all external sources whatsoever; and if the result to which we have arrived differs from that of these learned state courts, we may regret it, but it cannot be permitted to alter our judgment."

And this court, in one of its more recent decisions, viz: *Liverpool & Great Western Steam Company v. Phenix Insurance Company*, 129 U. S., 397, speaking through Mr. Justice GRAY, say:

"On any question depending upon mercantile law and not upon local statute or usage, it is well settled that the courts of the United States are not bound by decisions of the courts of the state, but will exercise their own judgment, even when their jurisdiction attaches only by reason of the citizenship of the parties, in an action at law of which the courts of the state have concurrent jurisdiction, and upon a contract made and to be performed within the state."

And in support of the proposition last above quoted, numerous decisions of this court are referred to,—among them the *Carpenter* case.

Decisions of state courts were pressed upon this court

to induce a different decision from that unanimously reached in 1842; but with the exception of the *Norwood* case and those following it, no decisions in point can be found opposing the doctrine of the *Carpenter* case, save only such as emanate from courts who have disregarded the rules of evidence and misapplied the doctrines of waiver and estoppel.

Counsel feel that they might rest content with the citation of the *Carpenter* case, but the importance of the question involved and the sharp conflict of opinion, justify consideration of the principles upon which it rests, and of the sweeping assertion of Judge CALDWELL, which we quote from his opinion in the *Norwood* case as follows:

> "The early doctrine on this subject has been so generally denied and repudiated by the courts of the country, state and federal, that it has come to be regarded as overruled and obsolete. Among the decisions of the supreme court of the United States which effectually dissipate the doctrine of *Carpenter v. Insurance Co., supra*, attention may be called to the cases of *Insurance Co. v. Wilkinson*, 13 Wall., 222; *Insurance Co. v. Norton*, 96 U. S., 234; *Eames v. Insurance Co.*, 94 U. S., 621."

Keeping in mind the fact that the *insured*, in the case at bar, *contracted that it would not claim a waiver* of any of the provisions of the policy upon which this suit is based, *unless such waiver should be in writing indorsed upon or added thereto*, your Honors' attention is challenged to the facts of *Insurance Co. v. Wilkinson*, the first of the decisions of this court which is referred to by Judge CALDWELL as "effectually dissipating the doctrine of the *Carpenter* case."

The fact in the *Wilkinson* case was that the soliciting agent of the insurance company prepared the signed application for the policy, which contained a representation of fact, inserted without the knowledge of the applicant, and concerning which he had refused to make any statement; and it was held that the act of the agent in inserting in the

application, without the knowledge or consent of the applicant, a statement not true in fact, was the act of the company and not of the insured; and that the admission of verbal testimony to show the facts, did not contradict the written contract, on the theory that the untruth inserted by the insurance agent in the application, was not the statement of the insured.

In *Insurance Co. v. Norton*, the second of the decisions of this court cited as showing that the doctrine of *Carpenter v. Insurance Co.*, is effectually dissipated, the question was whether or not the company had waived the forfeiture of the policy for failure to pay the premium notes at their maturity. The policy in that case contained an "express declaration that the agents of the company were not authorized to make, alter, or abrogate contracts or waive forfeiture," and "these terms," says Mr. Justice BRADLEY, "had the company so chosen, it could have insisted on." He further observes: "But a party always has the option to waive a condition or stipulation made in his own favor. The company was not bound to insist upon a forfeiture, though incurred, but might waive it." Reference is made to the fact that there was evidence to show that the company had allowed its agents to take notes instead of money for premiums and to grant indulgence on these notes. The opinion recites:

> "It acquiesced in and ratified their acts in this behalf. For a long period, it allowed them to give an indulgence of ninety days; after that, of sixty; then of thirty days. It is in vain to contend that it gave them no authority to do this, when it constantly allowed them to exercise such authority, and always ratified their acts, notwithstanding the language of the written instruments."

In the third case cited by Judge CALDWELL, viz. *Eames v. Insurance Co.*, the action was in equity to compel the delivery of a contract for insurance, partly oral and partly written, upon property which was destroyed by fire before

the policy was received by the insured. An application, in which all the facts relating to incumbrances and other insurance was substantially set forth, was forwarded to the general agent of the company; and the delay in the issuance of the policy was due to a disagreement about the premium rate which was fixed by the general agent, who also in case of extra hazardous risks, such as the subject of insurance in the particular case, determined whether or not the company would write the insurance.

The decision of the point upon which the case turned, rests upon the principle announced in *Insurance Co. v. Wilkinson*, *supra*, that the act of the agent in taking the application, and who wrote the answers therein with full and exact knowledge of the actual facts (and which application had been referred to the general agent of the company in correspondence), was the act of the company itself.

Following the citation of the *Wilkinson*, *Norton* and *Eames* cases, Judge CALDWELL observes:

"The cases in this court to the same effect are *Insurance Co. v. Snowden*, 7 C. C. A., 267, 58 Fed., 342; *Insurance Co. v. Robison*, 7 C. C. A., 444, 58 Fed., 723; *Assurance Soc. v. Winning*, 58 Fed., 541, 7 C. C. A., 359, 19 U. S. App., 173."

In the *Snowden* and *Robison* cases, applications for the insurance were made to agents of the insurance companies who, with knowledge of the facts, put their own construction thereon. These cases are squarely within the principle of the *Wilkinson* case.

In the *Winning* case, the points involved as stated by Circuit Judge THAYER are as follows:

"Did the trial court err in permitting the plaintiff to show, with a view of establishing a waiver, that the defendant company had declared its intention to forfeit the policy if the premium of April 5, 1889, was not paid at maturity, and in permitting the plaintiff to further show that the

company had in fact carried that purpose into execution on May 31, 1889, by declaring the policy forfeited, and by entering it on its books, both at its home office and at its St. Louis agency, as a lapsed policy?

Secondly. Did the trial court err in refusing to charge at the conclusion of all the testimony that there was no evidence from which the jury could find that the provision relative to proofs of loss had been waived, and that the jury should accordingly return a verdict in favor of the defendants?"

With due regard for the opinion of Judge CALDWELL and his concurring associate, it is submitted that none of the cases cited as effectually dissipating the doctrine of the *Carpenter* case, involved its doctrine; and, as Judge SANBORN says in his dissenting opinion in the case at bar (44), citing many authorities:

"Since the decision in *Firemen's Fund Insurance Co. v. Norwood*, to which the writer has never assented, this court (circuit court of appeals, eighth circuit), has frequently held that no representation, promise or agreement made, or opinion expresssd in the previous parol negotiations as to the terms or legal effect of the resulting written agreement can be permitted to prevail over the plain provisions and just interpretation of the written contract. * * * As a prior or contemporaneous oral agreement that the policy should be valid without the endorsement of prior insurance could not avoid the written stipulation that it should be void, much less would the mere knowledge of both parties that the prior insurance existed without any agreement concerning it have that effect."

The quotations in the majority opinion in the *Norwood* case from *Reed v. Insurance Co.*, (R. I.,) 24 Atl., 833, are challenged as an unfair presentation of the views of the Rhode Island court. It will be observed by comparison of the opinion in the case cited with the quotation made by Judge CALDWELL, that the opinion states at considerable

length the reasons assigned for the statement: "There is much room for doubt, therefore, whether public policy requires the adoption of a rule which treats a contract of insurance differently from any other contract in writing."

Immediately following the language with which Judge CALDWELL ends his quotation is the following:

"Opposed to this line of decisions, Massachusetts has stood almost alone, with a sturdiness characteristic of the commonwealth, and the decision of this court in *Wilson v. Insurance Co.*, 4 R. I., 141, was in harmony with the Massachusetts cases."

Then follows a statement of the point involved, and of the holding of the court, in its previous decision, and the contention adverse to the conclusion reached in the *Reed* case is thus disposed of:

"Stability of decision is very important in the administration of the law, and as this doctrine has stood so long in this state, apparently without question, *and as it rests upon good reason*, and is, moreover, in line with the rule of the state under whose law both these policies were issued, we see no sufficient ground to depart from it."

Furthermore, the dissenting opinion of Judge CALDWELL himself, in *McMaster v. New York Life Ins. Co.*, 99 Fed., 856, 885, is authority for the statement that the *Norwood* case had in effect been overruled by the circuit court of appeals of the eighth circuit, before the decision in the case at bar; he says:

"In *Insurance Co. v. Norwood*, 16 C. C. A. 136, 69 Fed. 71, the question under discussion was decided by this court after full argument and consideration.

The opinion in that case is exactly opposed to the opinion of the majority in this case, and yet the majority opinion nowhere refers to the *Norwood* case."

In a previous decision of the circuit court of appeals of the eighth circuit, in the same case. *Insurance Co. v. Mc-*

Master, 57 U. S. App. 638, 30 C. C. A., 532, 87 Fed., 63, *supra*, the court upon an extended review of decisions of the state and federal courts, unanimously declared:

"It is useless to review other decisions. This proposition is founded in reason, and sustained by the authorities, and it should be deemed to be the settled law of the land: No representation, promise, or agreement made, or opinion expressed, in the previous parol negotiations as to the terms or legal effect of the resulting written agreement, can be permitted to prevail, either at law or in equity, over the plain provisions and just interpretation of the contract, in the absence of some artifice or fraud which concealed its terms and prevented the complainant from reading it."

Among the cases extensively noticed in the opinion in the case last cited which was written by Judge SANBORN, and which are cited in support of the proposition announced by the court as the settled law of the land, is *Assurance Co. v. Norwood*, 57 Kan. 610, 47 Pac. 529.

The Kansas case grew out of the same fire, and is based upon the same facts, and was brought by the same party, as the *Norwood* case decided by Judge CALDWELL; the Kansas court say:

"There is no more wholesome or well-settled rule of law than that parol evidence of prior or contemporaneous conversations, and oral agreements, is inadmissable to contradict or vary the terms of a written contract.

Express mention is made of *Insurance Co. v. Norwood*, 69 Fed., 71; but the court with regard to it observe:

"We find ourselves unable to concur in the conclusion reached by that eminent court that 'by delivering their policies with knowledge, through their agents, of the amount of insurance intended to be taken, the companies waived the condition as to other insurance, and were estopped to set the same up after a loss.' *

> * * We are better satisfied with the reasoning of Judge SANBORN in his dissenting opinion, than with the views of the majority of the court."

The majority opinion in the case at bar cites *London and Lancashire Ins. Co. v. Fischer*, 34 C. C. A., 503, 92 Fed., 500 (C. C. A., sixth circuit), and *McElroy v. British American Assurance Co. of Toronto, Canada*, 36 C.C.A., 615, 94 Fed., 990; it is perhaps sufficient to say that a casual reading of the opinions in those two cases will show that the views of Judge CALDWELL as expounded in the *Norwood* case, are accepted without consideration of the legal impossibility of waiving a condition of a subsequently executed contract, nor of the abrogation, necessarily involved, of the rule enforced by all courts, with exceptions generally only against insurance companies, which is so clearly and succinctly stated by Judge SANBORN in the quotation last above made from his dissenting opinion in the case at bar.

In the *McElroy* case, the learned circuit court of appeals of the ninth circuit, do not pretend to separate and distinguish the principles underlying the several classes of cases which it cites in support of its opinion and judgment. A number of decisions on the question of waiver are referred to, including certain cases reported in 149 N. Y., which are cited in the majority opinion in the case at bar, and the court fall into the same error as the state courts, holding that there can be a waiver by the agent's knowledge of concurrent insurance and an existing incumbrance before the policy is written, of a condition of the policy against concurrent insurance and existing incumbrances not consented to in a particular manner, and which policy, when delivered to and accepted by the insured, contains the identical condition held to be waived; referring to a line of decisions which, like the *Wilkinson* case, rests upon the principle that *the act of the agent of an insurance company in taking a written and signed application for insurance*, and

who, with knowledge of the facts, inserts statements therein at variance with the facts as they exist, is the act of the company itself.

There is nothing in the facts of the *McElroy* case as recited by the court, to justify the application of the principle involved in the *Wilkinson* and kindred decisions. The *McElroy* case was decided, and wrongly decided on the question of waiver, and the false logic and disregard of elementary principles responsible for all such judicial utterances will, it is believed, be manifest to your Honors.

Statements to the effect that decisions of this character are in accord with "the great weight of authority" are frequently found in judicial opinions which thus hack the insurance contract out of all semblance to its original form; this is a convenient, though trite phrase; but a carload of feathers, which a puff of wind would scatter to the four corners of the earth, does not weigh as much as a small bar of gold which can easily be hidden under the feathers; and the logic of the crisp and vigorous language of the court of appeals of the seventh circuit, in *United Firemen's Insurance Co. vs. Thomas*, 82 Fed., 406, and of Judge SANBORN's dissenting opinion in the case at bar, have cleared away a lot of rubbish which has crept into the reports regarding waiver of stipulations in insurance policies: their views are in harmony with all that this court have ever said, and they ground their opinions upon the decisions of this supreme tribunal of the world, which have either been negligently overlooked or intentionally disregarded by every court and every judge who has held to the contrary of the *Carpenter* case.

In *Union National Bank v. German Insurance Company*, (C. C. A., 7th circuit), 71 Fed., 473, the facts were exactly like those in the case at bar. For a full statement thereof, your Honors are referred to the opinion. Judge JENKINS for the court, says:

"The limitation of the amount of concurrent insurance was therefore material to the risk; and, since the amount of concurrent insurance was in excess of the limitation there can be no recovery if that provision has not been waived. *Carpenter v. Insurance Co.*, 16 Pet., 495," and other cases.

The court further say:

"It is insisted that this provision of the contract has been waived because of the fact that O'Rourke, *the agent, knew, when this policy was issued, of the other insurance upon the property in excess of the stipulated amount.* It is not urged that the defendant company knew of the fact but that the knowledge of the agent is to be imputed to the defendant. It is said that, in the autumn prior to the issuance of this policy, the agent stated to Mr. Morrison that the taking of the policy in the Phoenix of $2,500 upon the wheat in the granary would not conflict with his carrying $2,500 other insurance on the farm products contained in the granary. There are several reasons why this contention cannot avail:

1. *This conversation was prior to the issuance of this policy.* We need not now consider whether the issuance of the policy in question was a part of and a mere continuation of the original transaction in November, 1888, or was an independent and a different transaction. In either case the conclusion must be the same. *We think it established and elementary law that parol negotiations leading up to a written contract are merged in the contract, and are not to be controlled or affected by parol evidence of the understanding of the parties.*

The same court in *United Firemen's Insurance Co. v. Thomas, supra*, 82 Fed., 406, and 92 Fed., 127, held squarely to its previous decisions. The court say:

"The question is presented whether his knowledge, (that of the agent of the insurance company) prior to the issuance of the policy, of intended other insurance, will vitiate a stipulation in the policy forbidding such other insurance. It is the settled law with respect to written contracts of insurance, as well as to other written contracts, that all negotiations or agreements leading up to the written contract are merged in it, and that parol

evidence of a supposed prior agreement cannot be entertained to contradict the express stipulations of the written contract. Thus, in *Thompson v. Insurance Co.*, 104 U. S., 252, 259, it was ruled that 'a parol agreement, made at the time of issuing a policy, contradicting the terms of the policy itself, like any other parol agreement inconsistent with a written instrument made contemporary therewith, is void, and cannot be set up to contradict the writing.' We have had occasion to speak to the same effect, and in no doubtful language. *Union Stock Yards & Transit Co. v. Western Land & Cattle Co.*, 18 U. S., App., 438, 453, 7 C. C. A., 660, and 59 Fed., 49; *Gorrell v. Insurance Co.*, 24 U. S., App., 188, 11 C. C. A., 240, and 63 Fed., 371; *Lumber Co. v. Comstock*, 34 U. S. App., 414, 18 C. C. A., 207, and 71 Fed., 477. *The written contract speaks conclusively the agreement of the parties, and cannot be contradicted by parol. Therefore a supposed agreement to permit other insurance, made before the written contract, cannot avail to defeat the subsequent express stipulations of the written instrument. Much less can mere knowledge of an intention of the proposed assured to effect, or that he had effected, other insurance, avoid the conditions of the subsequent written contract.*"

A rehearing in the case having been granted, the court remark (92 Fed., 127, 135), upon the point under consideration: "We are satisfied that the correct result was arrived at in our previous decision."

In *Hartford Fire Insurance Company v. Small*, 66 Fed., 490, the circuit court of appeals of the 5th circuit say of the identical clause which we insist bars the plaintiff's recovery herein:

"These stringent clauses in contracts of this kind are often made the subject of adverse comment, and, with whatever of justice this is often done, it must be borne in mind that courts do not make contracts for parties, and must enforce them, unless there is some valid reason for not doing so. On this subject the supreme court of the United States, in the case of *Insurance Co. v. Unsell*,

144 U. S., 450, 12 Sup. Ct., 671, quoting from the case of *Thompson v. Insurance Co.*, 104 U. S., 252, says:

'Courts do not favor forfeitures, but they cannot avoid enforcing them when the party by whose default they are incurred cannot show some good and stable ground in the conduct of the other party on which to base a reasonable excuse for the default.'

It is perhaps proper to say in this connection that the question of consent to additional concurrent insurance is not a mere technical one, but is based upon sound principles in the law of insurance. It is to discourage overinsurance where it would be to the interest of the assured to incur a loss, and so put a premium on fraud."

The following language of Mr. Justice MILLER in *Insurance Co. v. Lyman*, 15 Wall., 664, is in point:

"Undoubtedly a valid verbal contract for insurance may be made, and when it is relied on, *and is unembarrassed by any written contract for the same insurance*, it can be proved and become the foundation of a recovery as in all other cases where contracts may be made either by parol or in writing. But it is also true that *when there is a written contract of insurance it must have the same effect as the adopted mode of expressing what the contract is, that it has in other classes of contract, and must have the same effect in excluding parol testimony in its application to it that other written instruments have.*"

That statement was not given in the *Norwood* case, the consideration due the supreme court of the United States, wherein the majority of the circuit court of appeals remark, if the insurance contract "can be made by parol it may be varied by parol," and that "parties to contracts cannot disable themselves from making any contracts allowed by law in any mode the law allows contracts to be made. A written contract may be changed by parol and a parol one changed in writing, despite any provision in the contract to the contrary."

Mr. Justice MILLER further observes in his opinion in the case last cited:

"We think it equally clear, that the terms of the contract having been reduced to writing, signed by one party and accepted by the other at the time the premium of insurance was paid, *neither party can abandon that instrument, as of no value in ascertaining what the contract was, and resort to the verbal negotiations which were preliminary to its execution, for that purpose. The doctrine is too well settled that all previous negotiations and verbal statements are merged and excluded when the parties assent to a written instrument as expressing the agreement.*"

In *Allison v. Phoenix Ins. Co.*, 3 Dill 480, the *Carpenter* case was distinguished, Judge DILLON holding that it did not control the case before him, said:

"But, if the case at bar falls within this principle, *it is our duty* implicitly to apply that principle to it."

The supreme court of Missouri, in *Hutchinson v. Western Ins. Co.*, 21 Mo., 97, cited and followed in *Rothschild v. American Central Ins. Co.*, 62 Mo., 356, 362, announce a clear cut statement of the rule:

"If other insurance exists at the time, and is not endorsed, although communicated or known to the underwriters, it is not enough. The condition is not complied with, and no contract exists. (*Carpenter v. Providence-Washington Ins. Co.*, 16 Pet., 512; *Barrett et al v. Union Mutual Fire Ins. Co.*, 7 Cush., 178; 1 *Phillips on Ins.*, 477.)

There can be no distinction in this particular between a present and a subsequent insurance, and the present condition extends to both existing and future policies, and if there is a failure to indorse either, the stipulation is not complied with."

In *Gardiner v. Insurance Co.*, 38 Me., 439, 442, citing the *Carpenter* case, the court say:

"The plaintiff had the right to enter into such contract if he

deemed it proper, and though it may operate severely upon him, yet, it is not competent for the court to relieve him from the legitimate consequences of his own voluntary contract."

It is to be borne in mind that this is not a suit in equity to reform the contract, but an action at law in which the policy as made delivered and accepted, is declared upon as the basis of the suit.

No agreement is pleaded that consent for concurrent insurance was to be indorsed in writing upon the policy; not even an agreement that concurrent insurance was, in fact, to be allowed; but the plaintiff's right to recover is placed squarely upon the allegation (3), that the company's agent "issued said policy, * * * with knowledge before hand of said concurrent insurance and with the intent knowingly to waive the condition of said policy that 'it shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, on the property covered thereby." And that by the conduct of its agent "the defendant has waived the said condition and is estopped to claim benefit thereof and is bound by its said policy, notwithstanding said condition." Nor does the reply (15, 16), plead an agreement to indorse in writing upon the policy the company's consent to concurrent insurance, nor does it allege that the defendant's agent consented to concurrent insurance, but the allegations of the petition are substantially restated, and the issuance of the policy, with knowledge of concurrent insurance, is pleaded as a waiver and estoppel of the condition against concurrent insurance not consented to in writing indorsed on the policy sued upon.

But a plaintiff in a law action is bound by his pleading, and in a suit upon a contract upon which the petition declares, is bound by the provisions and conditions of the contract.

In *Imperial Fire Ins. Co. of London v. Coos County*, 151 U. S., 452, 14 Sup. Ct., 379, it is held that a condition avoiding the policy in case "mechanics are employed in building, altering, or repairing the premises without notice to or permission of the insurer" is broken, and the policy annulled, by the making of extensive alterations without such notice or permission, irrespective of whether the risk was in fact increased during the time of the alterations, or whether the increase continued at the time of the loss.

This court say:

"The specific thing described in the last condition as voiding the policy, if done without consent, was one which the insurer had a right, in its own judgment, to make a material element of the contract, and, being assented to by the assured, it did not rest in the opinion of other parties, court or jury, to say that it was immaterial, unless it actually increased the risk."

And your Honors quote with approval the following language from *Mack v. Ins. Co.*, 106 N. Y., 560, 13 N. E., 343:

"These conditions when plainly expressed in a policy are binding upon the parties, and should be enforced by courts, if the evidence brings the case clearly within their meaning and intent. *It tends to bring the law itself into disrepute when by astute and subtle distinctions a plain case is attempted to be taken without the operation of a clear, reasonable, and material obligation of the contract.*"

Elsewhere in the opinion, your Honors say:

"It is enough that the parties have made certain terms and conditions on which their contract shall continue or terminate. The courts may not make a contract for the parties. Their function and duty consists simply in enforcing and carrying out the one actually made."

The language last quoted is cited with approval and followed by the circuit court of appeals of the sixth circuit in *Georgia Home Ins. Co. v. Rosenfield*, 95 Fed., 358, in which

case a recovery upon the policy was denied, although its facts are closely analagous to those of *Insurance Co. v. Norwood* and *Ins. Co. v. Fischer, supra.*, the *Fischer* case, as will be remembered, having been decided by the same court.

And the same court in *Union Central Life Ins. Co. v. Berlin*, 101 Fed., 673, citing *Insurance Co. v. Coos County* and *Insurance Co. v. Roseafield*, say:

"The parties, having made certain terms conditions on which the contract was to continue or to terminate, the contract as thus made must be enforced, *unless performance* was waived by the insurer."

The rule is thus stated by the supreme judicial court of Massachusetts:

"If from mistake or fraud an agreement is so defective, that instead of conveying the meaning of the parties, it expresses a different or opposite intent, if relief can be given at all it must be sought exclusively in a court of equity. A court of law must act under the agreement as it is; it cannot strike out or change any part or add anything to it, so as to contradict or vary the agreement contained in the written instrument."

Barrett v. Ins. Co., 7 Cush., 175; citing *Carpenter v. Ins. Co., supra.*

The facts in the case in Cushing were that, when the policy issued "there was a previous insurance which was not expressed, nor in any way mentioned or referred to in the policy;" and the court say:

"By its own express terms, therefore, this policy is void."

In *Batchelder v. Queen Ins. Co.*, 135 Mass., 449, the rule laid down in Cushing predicated upon the *Carpenter* case was adhered to. Mr. Justice HOLMES speaking for the court said:

"The policy sued upon was conditioned to be void in case of other insurance, and the plaintiff's evidence showed that there was other insurance outstanding when the

policy was delivered. But there was also evidence tending to show that the breach of condition was known to the defendant at the same time; and the plaintiff argues that he was at least entitled to ask the jury to find that the breach had been waived. However the law may be elsewhere, it is settled the other way in Massachusetts. A breach of a contract happening after a policy is issued, may be waived, no doubt; but when the breach exists at the moment when, if ever, the contract comes into existence, it must be waived at that moment, if ever, and at that very instant the writing purports to establish and insist upon the condition. We must follow the decisions that parol evidence of such a waiver as is relied on in this case would contradict the written instrument upon which the suit is brought. *Barrett v. Union Ins. Co.*, 7 Cush. 175."

The court also cite *Oakes v. Ins. Co.*, 135 Mass., 248, in which *Barrett v. Ins. Co., supra*, is thus commented upon:

"In that case, a policy was issued by a mutual company subject to a by-law, which formed part of the contract, to the effect that all policies upon the property previously insured should be void, unless such previous insurance was mentioned in the policy at the time it was issued. There was previous insurance not mentioned in the policy; and it was rightly held that, in an action on the policy, parol evidence was inadmissible to show that this had been made known to the company and assented to by it. The evidence would have utterly contradicted the written instrument declared on. The policy in effect stipulated that its delivery should not make a contract, if there was previous insurance not mentioned. The evidence went to show that delivering the policy made a contract, notwithstanding such insurance; or, in other words, that *the condition precedent was not insisted on* at the very moment when, *by the words of the policy, it was insisted on.*"

The Authority of the Agent Who Issued the Policy in Suit was Limited and the Insured was Notified of the

Restrictions Upon the Agent's Authority, and the Measure of His Power, and the Manner in which only it Could Be Exercised, By the Policy.

The duties and powers of Borgelt, the recording agent of the defendant, are found by the jury (18), as follows:

"A. D. Borgelt was recording agent of the Northern Assurance Company at Lincoln, Nebraska, with authority from defendant to countersign and issue its policies and accept fire insurance risks in its behalf, and collect and receive premiums therefor, and issued the policy sued on as such agent."

This finding accords with the averment of the petition respecting the character of Borgelt's agency. It thus is limited and prescribed, and cannot be considered as in any sense a general agency. From the expressions to be found in many of the decisions, it apparently has been assumed that such an agency as that of the individual who wrote the policy in suit in the case at bar is a general agency, and upon this erroneous assumption many erroneous judgments have been rendered. Some of these decisions are noticed by the supreme court of Rhode Island, in *Reed v. Insurance Co., supra.*

The *Norwood* case assumes that the agent who wrote the insurance was a general agent; but, as well might a ticket seller at a railroad depot be held a general agent of a railroad company. The insurance business has reached such proportions in this country that the court will take judicial notice that insurance companies do not clothe every person authorized to solicit insurance, with the powers of general agents.

State agents who establish and inspect local agencies, adjust losses, and even define the business policy which an insurance company shall pursue in a state or locality are generally not clothed with the powers of general agents.

The doctrines of the law of agency ought not to be so distorted as to do violence to language and the usage of the commercial world.

The policy in suit originated in New York, and is generally known in the insurance business and recognized by decisions of courts of last resort from Maine to California as the New York standard policy. By the statement of facts in *Quinlan v. Insurance Co.*, 133 N. Y., 356, 31 N. E., 31, a case frequently cited and followed by the circuit court of appeals for the eighth circuit, and especially in *New York Life Ins. Co. v. McMaster*, 87 Fed., 63, and in *McMaster v. Ins. Co.*, 99 Fed., 885, *supra*, it appears that the New New York standard policy was formulated by an act of the legislature of New York passed in 1886; and the opinion in the *Quinlan* case states the construction of the court of appeals of New York upon the clause of the policy under consideration. That court in a still later case, viz: *Moore v. Hanover Fire Ins. Co.*, 141 N. Y., 219, 36 N. E., 191, in an opinion concurred in by Mr. Justice PECKHAM, make use of the following language:

"The use of the standard policy was compelled by legislative enactment to remedy existing evils, and among others to protect insurance companies from *the perils of alleged parol waivers by their local agents.*"

The language quoted is of great significance and makes it plain that the radical decisions of radical courts have utterly misconceived the purpose of the adoption of a standard form of fire insurance policy.

In the *Quinlan* case it is said:

"No principle is better settled in the law, nor is there any founded upon more obvious justice, than that if a person dealing with an agent knows that he is acting under a circumscribed and limited authority, and that his act is outside of and transcends the authority conferred, the principal is not bound, and *it is immaterial whether*

the agent is a general or special one, because a principal may limit the authority of the one as well as that of the other. *Walsh v. Insurance Co.*, 73 N. Y., 10. The limitations upon the authority of Kelsey were written on the face of the policy. It declared that 'no officer, agent, or representative' of the company should have power to waive any provision or condition embraced in the printed and authorized policy, but power is given to agents to waive added provisions or conditions, provided such waiver is written upon or attached to the policy. *Where a policy permits an agent to exercise a specified authority, but prescribes that the company shall not be bound unless the execution of the power shall be evidenced by a written indorsement on the policy, the condition is of the essence of the authority*, and the consent or act of the agent not so indorsed is void."

The court, speaking of the change in the condition of the insurance business because of the adoption of the standard form of policy, say:

"Now, as heretofore, it is competent for the parties to a contract of insurance, by agreement in writing or by parol, to modify the contract after the policy has been issued, or to waive conditions or forfeitures. The power of agents, as expressed in the policy, may be enlarged by usage of the company, its course of business, or by its consent, express or implied. * * * But where the restrictions upon an agent's authority appear in the policy, and there is no evidence tending to show that his powers have been enlarged, there seems to be no good reason why the authority expressed should not be regarded as the measure of his power."

This case also holds:

"It is immaterial whether the plaintiff read the policy or not, or that he had no actual knowledge of the conditions or of the limitations of the power of Kelsey (the agent). *The conditions and limitations were a part of the contract, and he was bound to take notice of them*, and is not excused upon the plea that he omitted to acquaint himself with the provisions of the policy."

In *Kyte v. Commercial Union Assurance Company*, 144 Mass., 43, 10 N. E., 518, Mr. Justice DEVENS, speaking for the court, said:

"*An agent to receive premiums and issue policies is not* independently of any evidence showing that he has a much larger authority than this, *empowered to waive conditions so important that parties have seen fit to incorporate them into their contract.* Some additional evidence must be offered, as that he had been held out by the company as possessing such authority, or that the company had so ratified similar acts, or so conducted itself, in regard to other transactions, that the insured was justified in believing that he had."

In *Ruthven v. American Fire Insurance Company*, 92 Ia., 316, 60 N. W., 662, it is stated:

"Ingersoll, Howell & Co., were, as we have already stated, local agents of the defendant company. They had nothing to do with the adjustment of losses. *The mere fact that an agent is shown to have authority to issue policies and countersign the same does not warrant an inference that he has authority to* adjust and settle losses, or *waive the performance of the conditions in the policy*; and the fact that he assumes to do so does not even tend to establish his authority."

The New York court of appeals, in *Moore v. Ins. Co.*, *supra*, say of that clause of the standard policy under consideration, that:

"*Every person* who now enters into a contract of insurance *is required to agree* that no officer or agent or other representative of the company shall have power to waive any provision or condition of the policy, except such as by the terms thereof may be subject of agreement endorsed thereon; and as to such provisions and conditions the waiver must be written upon or attached to, the policy; *and he specially covenants that he will not claim any privilege or permission unless it be in writing.*"

In *Smith v. Niagara Fire Insurance Company*, 60 Vt., 682, 15 Atl., 353, it being undisputed that one Turner was the com-

pany's general agent, and with authority, unless restricted, and with notice to the insured of the limitation of his power, to waive any condition of the policy, the court observed that "the question remains whether he could do so save, in the manner provided by the contract." The opinion, which is an exhaustive review of the cases on the point, recites:

"One condition of the policy is that *no officer, agent, or representative* of the company should be held to have waived any of the conditions of the policy, unless such waiver was indorsed on the policy. *This provision was a valid one, binding upon the parties, and effect should be given to it.* While the defendant could give its oral consent to a waiver of the statement, no officer, agent or representative could consent unless the consent was indorsed on the policy. This point we think well taken. In *Carrigan v. Insurance Co.*, 53 Vt., 418, the contract provided that no agent was empowered to waive any of its conditions without special authority, etc., and it was held that this term referred to special agents, not general ones, and the case notes the distinction between the two; *here the limitation is upon the authority of any officer, agent, or representative.* If Turner was not an officer, he was certainly a representative; and his want of authority to waive any condition, unless by writing, indorsed on the policy, was brought to the knowledge of the plaintiff by the contract itself; and, where an agent's acts are in excess of such authority the principal is not bound. *Insurance Co. v. Wilkinson, supra* (13 Wall., 222); *Packard v. Insurance Co.*, (Me.) 15 Ins. Law. J., 475. Where an agent has apparent authority to do an act, his principal is bound; and, if the latter claims that the act is in excess of the agent's real authority, he should show actual notice to the party with whom he deals. In the case at bar the law presumes notice. It is a part of the contract. The plaintiffs agreed to it. Why should they be released from it? In *Walsh v. Insurance Co.*, 73 N. Y., 5, the court were called upon to meet a question similar to the one involved here, and they said: 'The company could itself dispense with this condition by

oral consent as well as by writing; and Carpenter (the agent) unless specially restricted, would have possessed, in this respect, the power of the principal. But the policy contains the provision that no agent of the company shall be deemed to have waived any of the terms and conditions of the policy, unless such waiver is indorsed on the policy in writing. This is a plain limitation upon the power of agents, and can mean nothing less than that agents shall not have the power to waive conditions except in one mode, viz., by an indorsement on the policy. The plaintiff is presumed to have known what the contract contained, and the proof tends to the conclusion that this provision was brought to his notice. He saw fit, however, to accept the assurance of the agent that an entry in the register was sufficient. It is difficult to see how, upon the law of contracts and agency, the plaintiff can recover. The entry in the register was not an indorsement on the policy. The oral consent was an act in excess of the known authority of the agent. *The provision was designed to protect the company against* collusion and fraud, and *the dangers and uncertainty of oral testimony*. The case seems to be a hard one for the plaintiffs, but courts cannot make contracts for parties, nor can they dispense with their provisions.' The same court, in *Marvin v. Insurance Co.*, 85 N. Y., 278, in disposing of an analogous question said: 'Here the policy in plain terms denied to any agent, local or general, the power to waive conditions; reserved that authority solely to the head office and some officer of the company there; and gave notice to the assured, upon the face of his policy of the existence of this restriction. Henkle, therefore, had no power to waive payment.' The same rule has been followed in Massachusetts. *Forbes v. Insurance Co.*, 9 Cush., 470. In *Bank v. Insurance Co.*, 11 Cush., 265, under a like limitation, an agent took the policy, made a memorandum on a book, and told the assured that it was the same as if indorsed on the policy. The court held that the policy was void. In *Hale v. Insurance Co.*, 6 Gray, 169, the policy prohibited previous

insurance without the consent of the president in writing. It was held that the policy was invalid, although the jury found an oral consent by the president."

The supreme court of Vermont in the case cited, referred to *Kyte v. Assurance Co., supra*, and *Cleaver v. Insurance Co.*, 65 Mich., 527, 32 N. W., 660, the latter case being reported a second time in 71 Mich., 414, 39 N. W., 571, and quoted the following language of Judge DEVENS in the *Kyte* case:

"*Nor even if the agent had the fullest authority, could the conditions of the policy be waived other than in the manner in which they provide for such waiver. The company, which has seen fit to prescribe that the terms and conditions of its policy shall only be waived by its written or printed assent, has prescribed only a reasonable rule to guard against the uncertain ties of oral evidence, and by this the insured has assented to be bound.*"

In the first appeal in *Cleaver v. Traders' Insurance Co.*, 65 Mich., 527, it was held:

"It cannot be successfully maintained but that the company has the right and power to restrict, as it may choose, the powers and duties of its agents, and, when the authority is expressly limited and restricted by the policy which the insured receives, *there can be no good reason, either in law or equity, why such limitations and restrictions shall be considered as known to the insured, and binding upon him.* This is not a case where the insured had a right to rely upon the action of the agent, or to presume that his action was known to the company, and ratified by them, as in *Security Ins. Co. v. Fay*, 22 Mich., 467. The policy received by Cleaver distinctly pointed out the way to procure additional insurance without voiding the first insurance, and expressly prohibited the agent from waiving or altering or modifying the process of obtaining further insurance.

The fact that plaintiff may not have read the printed conditions of his policy, and relied in ignorance of them upon the implied or assumed powers of the agent, can

not help him. It was his business to know what his contract of insurance was, and there can be no difference in this respect between an insurance policy and any other contract. In the absence of any fraud in the making of the same, and none is claimed in this case, the insured must be held to a knowledge of the conditions of his policy, as he would be in the case of any other contract or agreement. When the policy of insurance, as in this case, contains an express limitation upon the power of the agent, such agent has no legal right to contract as agent of the company with the insured, so as to change the conditions of the policy, or to dispense with the performance of any essential requisite contained therein, either by parol or writing; and the holder of the policy is estopped by accepting the policy, from setting up or relying upon powers in the agent in opposition to limitations and restrictions in the policy."

On the second appeal of the same case, 71 Mich., 414, it was said:

"The fact that Quinn (the company's agent) had authority, in a certain way and manner, to consent to the taking of the additional insurance, and had done so in other cases, does not aid the plaintiff. *He did not consent in this case within the line of his authority or in the manner prescribed by the policy*; and it is not shown that he was authorized to waive any of its provisions. The case, therefore, in this respect, stands as it did before, controlled by the clauses in the policy providing that the policy should be void if the insured procured further insurance without the indorsement of the consent of the company upon the policy, and that the agent has no authority to waive or modify this condition."

This is the rule in California, notwithstanding *Farnum v. Ins. Co.*, 83 Cal., 246, 23 Pac., 869, which is an authority in that state only for its own facts, and which contains a discussion of the effect upon the policy of credit given by the local agent for the premium thereon.

In *Gladding v. Insurance Co.*, 66 Cal., 6, 4 Pac., 764, it was claimed that the agent of the insurance company consented to an increase of the risk, but the court held:

"As to who should have indorsed on the policy a consent to an increase of risk in order to have it constitute a waiver of the condition that if the risk was increased the policy should be void, the instrument is silent. But it explicitly declares that unless so indorsed it shall not be construed as a waiver of any written or printed condition or restriction contained in the policy. *Apparently, the mode is the measure of the power.* If so, no officer of the company was authorized to consent to an increase of the risk in any other than the prescribed mode. We do not doubt the competency of the parties to stipulate that no condition or restriction contained in the policy should be waived except by endorsement on it; and that they did so stipulate is too clear to admit of doubt."

In the later case of *Enos v. Sun Insurnce Co.*, 67 Cal., 621, 8 Pac., 379, the following ruling was made, as shown by the head-notes of the case in the Pacific Reporter:

"Where the contract of an insurance company exempts it from the effect of any statement or act not contained in the written application for the policy, or indorsed on the policy, it is not bound by notice to its agents of anything different from what the policy and application contained.

Where a policy provides that a waiver of conditions contained in it can only be by indorsement or agreement on or attached to the policy, the local agent of the insurance company cannot waive the conditions of the policy except in the manner provided."

In *Ruthven v. American Fire Ins. Co.. supra*, it was held that not only the local agents but the special and adjusting agents of the company, had no power to waive a provision of the policy in any other manner than that prescribed by the policy itself. The court say:

"The authority of Miller (the special agent and adjuster), as well as Ingersoll, Howell & Co. and Werniemont (the representative of another company who figured some what in the adjustment), was limited by the express terms of the policy, of which plaintiffs will be presumed to have had notice. The policy provides, in substance, that no officer, agent, or other representative of the company shall have power to waive any provision or condition of the policy, except such as by the terms of the policy may be the subject of agreement indorsed thereon or added thereto. There is some conflict in the authorities as to whether this kind of an agreement or provision is valid or not. But we think the decided weight is in favor of the proposition that it is. (Citing authorities.)

What we do hold is that the provisions we have quoted are a limitation upon the power of its local, special, and adjusting agents, of which the plaintiffs had or are presumed to have had, knowledge, and that any agreement or waiver which they attempted to make would not be binding upon the company because not authorized."

In *Northwestern National Ins. Co. v. Mize*, 34 S. W., 670, the court of civil appeals of Texas reversed a judgment against the insurance company upon the following facts: The policy contained what is known as the iron-safe clause, compliance with which, it was claimed, was waived by the agent of the company at the time the policy was delivered. The insurance company had no notice of the attempted waiver on the part of its agent. The court say:

"The testimony shows, without contradiction, that appellee did not have an iron safe, and made no pretense to comply with the conditions expressed in the clause in question. To avoid the effects of the agreement, it was alleged and proved that, at the time the policy was tendered to appellee, the agent of the appellant told him that it was not necessary to comply with the requirements in the clause. Appellee read and fully understood the clause in question, and with this knowl-

edge accepted it. * * * The testimony shows that the local agent who issued the policy did not report to the general agents of the company anything in regard to the waiver of the iron-safe clause, and the insurance company had no notice whatever of any such agreement, unless notice to the local agent was notice to the company.

It is provided in the policy that it 'is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed or added thereto; and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions, no officer, agent or representative, shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto; nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.' As said in *Insurance Co. v. Wagner*, (Tex. Civ. App.), 30 S. W., 959, 'the object of this clause is to define and limit the powers and authority of the agent, and to prescribe the subjects about which he shall and shall not have authority to waive the provisions of the policy.' In this clause it is said, in distinct, plain language, that the agent shall not have the authority to waive the iron safe clause. The insured was charged with notice of the limitation upon the powers of the agent. *Insurance Co. v. Kempner*, 87 Tex., 229, 27 S. W., 126. The agent in endeavoring to set aside the iron safe clause, was acting contrary to his authority, and his knowledge of the facts was not notice to or binding upon the insurance company. *Insurance Co. v. Waters*, (Tex. Civ. App.), 30 S. W., 576; *First Nat. Bank v. Lancashire Ins. Co.*, 62 Tex., 466. Discussing the clause in question, the supreme court of Oregon says: 'No rule is better settled than where a

limitation on the power of an agent is brought home to the person dealing with him, such person relies upon any act in excess of such limited authority at his peril; and hence, when an insurance company limits the power of its agent, and notice of such limitation is brought home to the person dealing with him, it is not bound by any act done by the agent in contravention of the notice.' *Egan v. Insurance Co.*, (Or.), 42 Pac., 611."

The citation in the majority opinion, of the *Robbins* and *Wood* cases from 149 N. Y., will be hereinafter considered.

However, attention is directed to the fact that those cases, which it is submitted, misapply waiver and estoppel, through oral testimony with respect to an agreement or understanding regarding a contract of insurance subsequently reduced to writing and delivered, do not pretend to, and do not, repudiate the *Quinlan* and *Moore* cases, which expressly hold that the powers of local and recording agents of insurance companies are defined by the standard policy, and that *the method* of their exercise as therein prescribed, is *the measure* of such powers.

In *Bourgeois vs. Ins. Co.*, 86 Wis., 606, 57 N. W., 347, the court quote with approval the decision of the court of appeals of New York in the *Quinlan* case. The facts were "that the defendant's local agent was informed at the time the application for the insurance in question was made, that the plaintiff would take out $2,000 additional insurance upon the house, and that he consented thereto. This consent was by parol, and was the only consent procured or relied upon by the plaintiff."

The court discuss the standard policy of Wisconsin, which contains the identical condition against concurrent insurance found in the New York standard policy, and observe:

"It provides, in clear and distinct terms, that other conditions may be printed or written upon or attached to the policy, but that they shall not be inconsistent with, nor

a waiver of any of the provisions or conditions of the standard policy. In thus providing that other conditions may be incorporated in the policy by writing or printing, other methods are plainly excluded under familiar legal principles. * * * The condition here broken was one of the conditions of the standard policy. It is claimed that it was waived, not in printing or writing, but by mere word of mouth. * * * To our minds, it is clear that, since the enactment of this law, at least the local agent cannot, either in writing or by parol, at the time the insurance is effected, change or waive that provision of the standard policy prohibiting future additional insurance."

In *Insurance Co. vs. Lumber Co.*, 10 Colo., App. 223, 51 Pac. 174, the court of appeals of Colorado cite with approval the *Quinlan* and other cases cited in this brief, and announce the principles by which the authority of an insurance agent is to be measured. The agent in that case, not only had all the authority which Borgelt possessed, being the local agent at Denver of the company he represented, but had also issued policies in various other localities within the limits of the state of Colorado distant from Denver, and had occasionally acted as an adjuster on small losses for his company; but it was held that he was not a general agent, and an instruction to the jury on the assumption that he was a general agent was held error.

In *New York Life Ins. Co. vs. Fletcher*, 117 U. S., 519, this court say:

"The Company, like any other principal, could limit the authority of its agents, and thus bind all parties dealing with them with knowledge of the limitation. It must be presumed that he wrote the application, and was cognizant of the limitations therein expressed.

In *Globe, etc. Ins. Co. vs. Wolff*, 95 U. S., 329, the policy declared that the agents of the company were not authorized to waive forfeitures, and this court held that effect must be given to the provision, except so far as

the subsequent acts of the company permitted it to be disregarded.

In *Ins. Co. vs. Norton*, 96 U. S., 240, (one of the cases which the majority opinion in the *Norwood* case says effectually dissipate the doctrine of *Carpenter vs. Ins. Co.*), the policy contained an express declaration that the agents of the company were not authorized to make, alter or abrogate contracts or waive forfeitures; and this court held that the company could have insisted upon these terms had it so chosen."

There can be no Waiver Prior to or Concurrently With the Execution and Delivery of a Contract, of Conditions Thereof. A Waiver, if any, Must be Subsequent Thereto.

In *Globe Mutual Life Ins. Co. v. Wolff, supra*, this court say:

"The doctrine of waiver, as asserted against insurance companies to avoid the strict enforcement of conditions contained in their policies, is only another name for the doctrine of estoppel. It can only be invoked where the conduct of the companies has been such as to induce action in reliance upon it, and where it would operate as *a fraud upon the assured*, if they were afterwards allowed to disavow their conduct and enforce the conditions."

The theory of the majority opinion in the case at bar is thus stated (40, 41):

"The doctrine in question rests upon the ground that facts made known to the agent of an insurance company who is empowered by it to solicit insurance, countersign and issue policies, and collect premiums, is the knowledge of his principal, and that a fraud would be perpetrated if the insurance company, through the medium of its agents, was allowed to deliver one of its policies and accept the premium thereon with knowledge of facts which under its provisions render it void *ab initio*. To prevent the perpetration of such frauds

the courts have very generally held the insurer estopped from taking advantage of a condition or conditions found in one of its issued policies which in the light of known facts rendered the same void from the time of its delivery, or they have indulged in the charitable presumption that the insurer intended to waive the benefit of such a provision or that through accident or mistake it failed to modify the condition before the delivery of its policy, as it intended to do, so as to render it valid."

This theory of the majority is effectually refuted by the following language (46) in Judge SANBORN'S dissenting opinion, which is strictly in line with the statement of this court in *Ins. Co. v. Wolff, supra:*

"There seems to me to be no ground for a waiver by, or an estoppel of the insurance company in this case for several reasons, (1) because the company expressly limited the power of its solicitor to make waivers or work estoppels of the character here invoked to those made in writing by indorsement upon the policy and it brought notice of this limitation home to the insured by an express stipulation in the policy which the insured accepted, (2) because an *an indispensable element of an estoppel* is some act, statement or representation which tends to deceive the insured and thereby induces it to adopt a course of action or a state of inaction that it would not otherwise have taken, and *this case contains no such element.* The insured knew that there was other insurance. It knew that that it was not indorsed upon the policy. It knew that the solicitor had no power to deliver a valid policy without such an indorsement, and it knew that it agreed that without this indorsement its policy should be void, for all these things were written in the contract and the insured was charged with knowledge of its contents, (3) because there can be no waiver without an intention to waive and no intent to waive can be deduced or inferred from the mere fact of knowledge in the face of an express written stipulation to the contrary made and de-

livered at the time, (4), because no estoppel or waiver based on acts or knowledge prior to or contemporaneous with the making of an express written agreement on the subject can prevail over the express terms of that contract which as conclusively merges and supersedes all prior and contemporaneous negotiations and understandings by estoppel and by waiver as by words. *Insurance Co. v. Mowry*, 96 U. S., 547, 548; *United Firemen's Ins. Co. v. Thomas*, 82 Fed., 409."

In *Thompson v. Ins. Co.*, 104 U. S., 253, 259, the policy provided that it should be void on the nonpayment of the note taken for the premium; and this court held that a plea that a parol agreement was made, at the time of the giving and accepting of the note and policy, that the policy should not become void for the nonpayment of the note, but should only be voidable at the election of the company, was bad. Mr. Justice BRADLEY, in delivering the opinion of the court, said:

"An insurance company may waive a forfeiture, or may agree not to enforce a forfeiture; but a parol agreement made at the time of issuing a policy, contradicting the terms of the policy itself, like any other parol agreement inconsistent with a written instrument, made contemporary therewith, is void, and cannot be set up to contradict the writing."

In *Ins. Co. v. Mowry*, 96 U. S., 544, 547, the policy provided that it should be void and wholly forfeited if the premiums were not punctually paid. The agent who procured the policy agreed with the insured that the company should give notice when the premiums fell due, but this agreement was not contained in the policy. The company failed to give the notice, and the insured failed to pay the premium. The agreement of the agent before the policy issued was claimed to be an estoppel of the company against insisting upon the forfeiture of the policy. Mr. Justice FIELD, in delivering the opinion of the court, said:

"*All previous verbal arrangements were merged in the written*

agreement. The understanding of the parties as to the amount of insurance, the conditions upon which it should be payable, and the premium to be paid, *was there expressed, for the very purpose of avoiding any controversy or question respecting them.* * * * * *An estoppel cannot arise from a promise as to future action with respect to a right to be acquired upon an agreement not yet made.* * * * *The doctrine has no place for application when the statement relates to rights depending upon contracts yet to be made*, to which the person complaining is to be a party. He has it in his power, in such cases, to guard in advance against any consequences of a subsequent change of intention and conduct by the person with whom he is dealing. For compliance with arrangements respecting future transactions, parties must provide by stipulation in their agreements when reduced to writing. The doctrine, carried to the extent for which the assured contends in this case, would subvert the salutary rule that the written contract must prevail over previous verbal arrangements, and open the door to all the evils which that rule was intended to prevent. *White v. Ashton*, 51 N. Y., 280; *Bigelow Estop*, 437, 441; *White v. Walker*, 31 Ill., 422; *Faxton v. Faxon*, 28 Mich., 159."

Speaking of the doctrine of waiver sought to be applied in a similar case, Circuit Judge JENKINS in *United Firemen's Ins. Co. v. Thomas*, 82 Fed., 406, said:

"Nor do we understand that the doctrine of waiver can have application here. A waiver is an intentional relinquishment of a known right, an election by one to dispense with something of value, or to forego some advantage he might have taken or insisted upon. *Warren v. Crane*, 50 Mich., 301, 15 N. W., 465. Mr. BISHOP thus defines the term:

'Waiver is where one in possession of any right, whether conferred by law or by contract, and with full knowledge of a material fact, does or forbears the doing of something inconsistent with the existence of the right or of his intention to rely upon it. Thereupon he is

said to have waived it, and he is precluded from claiming anything by reason of it afterwards.' *Bish. Cont.* sec. 792.

But manifestly there can be no waiver of a nonexisting right, of that which does not exist. Delivery of the policy containing the stipulations against other insurance under circumstances which indicate a previous or contemporaneous parol agreement that such other insurance would be permitted cannot avail, for within the decision in *Thompson v. Insurance Co., supra*, and the other cases cited, no prior or contemporaneous parol agreement can be set up to contradict the writing. *The waiver must be subsequent to the written contract, and, to be operative, must be made not only with knowledge of the fact of other insurance, and with intent to waive the provisions of the existing contract, but must be supported by a valuable consideration*, or become operative by way of estoppel. Here, subsequent to the supposed knowledge of an intent to effect other insurance, the parties stipulated by their contract that it should be void if other insurance *had been* or should be effected, and that no waiver of any condition of the contract should be valid unless written upon or attached to the policy. *An intent to waive cannot be entertained from the mere fact of knowledge in the face of an express term of the contract made and delivered subsequent to such knowledge.*"

In *Girard F. & M. Ins. Co. v. Hebard*, 95 Pa. St., 45, the policy required that before the property insured should be transferred or conveyed, or the policy assigned, the consent of the company indorsed thereon in writing should be obtained. It was held that a waiver of the condition could not be predicated upon mere notice of the transfer, and that it was not necessary for the company to give notice of its disapproval. The court cite, among other cases *Carpenter v. Ins. Co., supra*.

In *American Credit Indemnity Co. v. Carrollton Furniture Mfg., Co.* 95 Fed., 111, the circuit court of appeals of

the second circuit had under consideration the terms of an insurance policy requiring notice of loss to be given within a certain time. It was claimed that the failure to give the required notice was waived by the defendant company.

The court say:

"The alleged waiver is founded entirely upon the silence of the defendant in not replying to the letter of December 17th. Mere silence cannot support the waiver of a positive requirement in the policy, in the face of the stringent terms of the contract, which expressly declare that silence is not a waiver of any defect in the notice of loss, *and by the further provision that changes in the conditions of the policy must be in writing, signed by the president or secretary.*"

On argument of this case in both of the lower courts, an attempt was made by opposing counsel to distinguish between cases where the additional insurance or incumbrance was effected after the policy was issued, and those where the insurance or incumbrance existed with the knowledge of the agent at the time the policy was issued. There is a distinction between the two classes of cases, but that drawn by counsel and some courts, rests upon the admitted want of authority of the agent after the issuance of a policy to alter its provisions, *and* the illegal claim that the agent has authority *before there is any policy*, to abrogate its terms. The true distinction between these two classes of cases is this: there may be a waiver of a condition of a policy in existence, but there can be none when the policy is *not* in existence. But there is no distinction in principle between a pretended waiver, by a verbal promise made before the delivery of a policy, to allow future additional insurance, and knowledge of or even verbal consent, prior to the delivery of the policy, to concurrent insurance, when the policy by its terms, requires such consent for either future additional or concurrent insurance to be by written indorsement thereon. *Insurance Co. v. Thomas, supra.*

The cases of *Wood v. American Fire Ins., Co.*, 149 N. Y., 382, and *Robbins v. Springfield Fire Ins. Co.*, 149 N. Y., 477, already noticed, illustrate the confusion of ideas which is responsible for a great many similar decisions of state courts who have sought to strip the insurance contract of its conditions, and substitute an artificial, court-made contract in its stead; but the presentation of opposing authorities and the argument of counsel based thereon has served no purpose, if the utter lack of logic and disregard of fundamentals in the *Robbins* and *Wood* and similar cases have not been demonstrated.

The majority opinion in the case at bar lays some stress (40), on the statements to be found in the text books of JOYCE, OSTRANDER, and MAY on Insurance: *Joyce on Insurance* is but a collection of cases, and the author nowhere pretends to express an opinion as to what the law is or ought to be. The contrariety of judicial opinion is held up to the profession, and almost any kind of a case can be supported by some precedent cited by Mr. JOYCE.

Mr. MAY, in section 145a, cites *Insurance Co. v. Fletcher*, 117 U. S. 529, and quotes the following language from the opinion:

"It was the duty of the applicant to read the application he signed. He knew that upon it the policy would be issued if issued at all. It would introduce great uncertainty in all business transactions, if a party making written proposals for a contract, with representations to induce its execution, could be allowed to show, after it had been obtained, that he did not know the contents of his proposals, and to enforce it, notwithstanding their falsity as to matters essential to its obligation and validity."

Upon this the author comments as follows:

"This seems to be sense and law. No rule relieving one party to a contract of the duty to exercise ordinary

care and prudence is recognized in regard to any other sort of negotiations, and I see no reason why it should be applied merely to contracts of insurance."

Section 497 of Mr. MAY'S work which is the section cited in the majority opinion, states the rule laid down in the *Wilkinson* case which, it is contended, has no application to the facts of the case at bar and other cases like it, but rests upon the principle that the act of the agent, authorized to receive written and signed applications for insurance, who with knowledge of the actual facts, misstates them in the application, concealing such misstatements from the applicant, is the act of the company.

Section 243 of *Ostrander on the Law of Fire Insurance*, cited by Judge THAYER, purports only to be a statement of decisions of the state courts upon the point under consideration; but it is to be noted that the learned writer refrains from expressing any approval of the rule announced by the courts in the cases he cites. He says in the section cited:

"It has been held that where other insurance was existing at the time of the writing of the policy in suit, and was known to the agent of the company who wrote it, the insurer will be estopped from setting up such other insurance in a defense to a claim for loss, notwithstanding no notice and consent had been expressed in writing. This has been held with great uniformity in disregard of the stipulation in the policy that no agent of the company has authority to waive any of its conditions except by distinct and specific agreement endorsed thereon. The courts appear to have based their decisions upon the equitable principle that the insurer, having accepted the premium with full knowledge of the other insurance, ought not to be permitted to escape performance of the obligation it has assumed and for which it has received the consideration demanded."

This author recognizes the fact that these courts in giving free play to their notions of what an insurance pol-

icy ought to provide, have stricken out of the insurance contract the condition under consideration, and states the ground upon which it professedly has been done; but we are permitted to state to your Honors, upon the authority of Mr. OSTRANDER himself, that, according to his view of the law, these cases abandon time-honored principles of construction, and by refusing their application to the insurance contract, open a door to frauds of the worst character; that the tendency of many state courts to depart from the rule that the written contract must be held to express all prior and contemporaneous agreements, leads to danger and takes away important safeguards of justice; and that the true rule in this class of cases is that laid down in the *Carpenter* case.

II

The Findings of Fact Leave the Question of Waiver to be Inferred as a Matter of Law, and the Judgment for Plaintiff Cannot be Sustained.

Waiver is a question of fact necessarily involving intent. Intention cannot be inferred as a matter of law; it also is a fact.

The jury found as between a representative of the plaintiff corporation who testified that the petitioner's agent was informed of the fact of concurrent insurance, and the agent who denied that he had been thus informed, that the agent did know of the concurrent insurance at the time he delivered the policy in suit; but that is as far as the finding goes. It does not reach the evidentiary fact of intention or the ultimate fact of waiver.

In *Patterson v. United States*, 2 Wheat., 221, 225, this court held:

"A verdict is bad if it varies from the issue in a substantial matter, or if it find only a part of that which is in issue.

The reason of the rule is obvious: it results from the nature and the end of the pleading. Whether the jury find a general or a special verdict, it is their duty to decide the very point in issue; and although the court in which the cause is tried may give form to a general finding, so as to make it harmonize with the issue, yet, if it appears to that court, or to the Appellate Court, that the finding is different from the issue, or is confined to a part only of the matter in issue, no judgment can be rendered upon the verdict."

See also *Suydam v. Williamson*, 20 How., 427.

The circuit court of appeals of the seventh circuit in *Wesson v. Saline County*, 73 Fed., 917, say:

"The question for review upon a special verdict or finding is whether the facts found are sufficient to support the judgment (Rev. St. sec. 700); and it is manifestly important, especially to the party having the burden of proof, that all the facts essential to the relief sought shall be explicitly and fully stated."

And the same court, in *Sneed v. Sabinal Mining & Milling Co.*, 73 Fed., 925, observe:

"Care should be taken to distinguish between the finding of a fact and a mere statement of evidence which tends to establish, or, it may be, establishes, the fact."

And again, in *Daube v. Coal & Iron Co.*, 77 Fed., 713, the same court say:

"The silence of the verdict in respect to a fact is equivalent to an express finding against the party who has the burden of proof * * * and, if facts essential to that conclusion have not been found, the necessary inference is that they did not exist."

See also *United States v. Harris*, 77 Fed., 821.

Judge CALDWELL, in his caustic dissenting opinion in *McMaster v. New York Life Ins. Co.*, 99 Fed., 856, 887, says:

"The rule is absolute and without an exception that the special findings of fact of the lower court must distinctly and specifically find every fact essential to support

its judgment. Nothing can be supplied by intendment."

Judge SANBORN in his dissenting opinion in the case at bar (46) says:

"There can be no waiver without an intent to waive and no intent to waive can be deduced or inferred from the mere fact of knowledge in the face of an express written stipulation to the contrary made and delivered at the time."

Judge JENKINS, in *United Firemen's Ins. Co. v. Thomas*, 82 Fed., 406, *supra*, thus states the principle:

"An intent to waive cannot be entertained from the mere fact of knowledge in the face of an express term in the contract made and delivered subsequent to such knowledge."

In *Insurance Company v. Lumber Company*, 10 Colo., App., 223, 51 Pac., 174, *supra*, the court of appeals of Colorado say:

"It is equally true that an intention (to waive an express condition of the policy) may not be presumed from the mere possession of knowledge (of facts amounting to a breach of that condition). There must be some evidence in the case tending to show an intention on the part of the agent to waive it."

In *Insurance Co. v. Hebard*, 95 Pa. St. 45, *supra*, it was held that a waiver of the condition of a policy requiring written consent to a transfer of the property could not be predicated upon mere notice of the transfer.

In *Hartford Ins. Co. v. Small*, 66 Fed., 490, 493, the circuit court of appeals of the fifth circuit held:

"On a question of a waiver of an express condition of a written contract or a consent that such condition need not be complied with after a breach of the condition has been made by the insured, there must be evidence that the subject-matter of the waiver and consent was in the minds of the parties at the time, and that it was consciously and purposely done by the minds of the parties coming together upon the definite proposition."

But the evidence, instead of showing that it was the intention of the defendant company to waive the provision of its policy against concurrent insurance without notice and consent thereto indorsed thereon, shows that as soon as the company learned there was other insurance upon the property it denied liability. The only evidence in the record touching the subject of waiver is a letter from the defendant's general agent to the insured, dated August 2, 1898, *which was introduced in evidence by the insured*, and conclusively refutes the idea that there was any waiver by the company.

The letter contains the following recital:

"We have your favor of *the 26th ult.*, enclosing us what purports to be proof of loss, making claim under our policy No. 310024 of Lincoln, Neb., agency, and issued to you for $2500, on household furniture, etc., while contained in the three-story brick and stone building on Lot F in Grand View Residence Park addition, on account of a fire which occurred on the 1st of June, 1898, and beg to say in reply *that your sworn statement therein advises us* that you had other insurance on this same property to the amount of $1500. *This additional insurance held by you was without the knowledge or consent of this company*, and was not permitted by agreement as provided for in lines Nos. 11, 12 and 13 of the printed conditions of our policy, to which we beg to refer you.

We therefore regret to have to advise you, and do now hereby say to you that the Northern Assurance Company specifically and absolutely denies any and all liability under said policy No. 310024 held by you, holding that said policy has been void from the date of its issue by reason of the said provision in regard to other insurance above referred to."

No question was made in the circuit court of appeals, nor is any made here, that the evidence does not support the findings. It is understood that under the federal appellate practice questions of fact will not be inquired into;

but the findings do not pretend to pass upon the question of waiver, and the single item of evidence upon the question is brought to the attention of your Honors to demonstrate that the essential fact of waiver was a legal inference of the trial court and of the circuit court of appeals, from the fact of knowledge, *contrary to the only evidence* in the case upon the point.

CONCLUSION.

The *Carpenter* case, though decided more than half a century ago, is the latest utterance of this court dealing with the question of insurance law for the present consideration of your Honors; because it was the unanimous judgment of this court: because the opinion was written by one of the greatest jurists of this or any other country: because it enforced a voluntary contract entered into between the parties: because the court refused to permit the terms of that contract to be varied by oral testimony, it takes rightful precedence over the contrary opinions of subordinate federal courts and of all the courts of all the states, and your petitioner invokes the law of that case as a bar to recovery in this suit.

Very respectfully submitted,

CHARLES J. GREENE,
RALPH W. BRECKENRIDGE,
Attorneys for Petitioner.

OMAHA, October 1, 1900.

Office Supreme Court U.S.
FILED
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JAMES H. McKENNEY,
Clerk.

No. 276.

Brf. of Greene & Breckenridge

For Petitioner Crapley

In the Supreme Court of the United States.

Filed April 22, 1901.

October Term, 1900.

No. 276.

NORTHERN ASSURANCE COMPANY OF LONDON, ENGLAND, PETITIONER,

v.

GRAND VIEW BUILDING ASSOCIATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

SUPPLEMENTAL AND REPLY BRIEF AND ARGUMENT OF PETITIONER.

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Supplemental and Reply Brief and Argument of Petitioner.

By way of comment upon the brief of defendant the following considerations additional to those stated in petitioner's original brief are submitted.

Petitioner affirms and argues that the authority of an agent like him who wrote the policy in suit, is defined, prescribed and limited by the policy itself. And although by the terms of the policy, the agent had power to waive or alter the written instrument in certain particulars, the policy requires that waiver or alteration to be made in a specified manner. The decisions of the courts of last resort of the states of New

York, Massachusetts, Iowa, California, Vermont, Michigan, Texas, Wisconsin and Colorado, and of this court, are cited to the point that the method by which an agent of an insurance company may change or alter the written or printed contract of insurance, is the measure of his power in that regard. (Petitioner's original brief pp. 25 to 39.)

In the presentation of his theory of the law of this case, the writer of defendant's brief, by inadvertence or otherwise—and whether inadvertently or otherwise is left for the inference of your Honors—discusses the authorities above referred to as though they were cited upon the questions of waiver and estoppel which many courts have injected into this class of cases. But the question of the extent of an insurance agent's authority as defined by the policy he issues is one thing, and whether the Company has waived or is estopped to set up a particular provision of the policy is another thing.

It is admitted that there are courts holding that the authority of an agent of an insurance company is prescribed by the terms of the insurance contract, and cannot be exercised otherwise than in the manner pointed out by the policy, which have also held that *knowledge of an agent*, at the time the policy is issued, of facts which by its terms avoid it, is to be imputed to the company. This class of decisions exhibits to your Honors exactly that condition of judicial instability, want of logic and separation from principle, which petitioner desires to bring to the attention of this court. For, between the decisions of any court holding that the authority of an insurance agent is defined by the policy, and that the policy gives notice to the insured of the limitations upon the agent's power and

authority, and decisions of the same court rendered the next week or the next month or the next year, that the knowledge of the agent whose authority is thus limited, of facts which breach any of the conditions of the policy, is imputable to the company, there is an irreconcilable inconsistency; in the one case the contract is enforced, in the other it is disregarded; in in the one case, the relations of the parties and their rights under the contract are ascertained by reference to it; in the other, firmly imbedded principles with regard to the sacredness of written instruments and their inviolability by oral testimony, are swept aside.

Laws may change with changing conditions but principles are eternal, and no considerations of convenience, nor sympathy, nor of mere individual opinion, whether of judges, counsel, or litigants, ought to divorce the facts of a case from the principles by which it must be determined.

All the way through defendant's brief runs the innuendo which ought to find no expression anywhere, and is inexcusable except before a jury, that an insurance company should not be permitted to accept the premium for a policy and not pay when a loss occurs; and in great variety of phrases, the want of good faith of the petitioner in this particular case is sought to be impressed upon this court. Counsel for petitioner repel the insinuation of bad faith, and submit to the court that the record shows that as soon as the Northern Assurance Company learned of the existence of the concurrent insurance, which was through a letter from defendant to petitioner nearly sixty days after the fire had occurred, it denied liability because of such concurrent insurance, instructed its agents to return the

premium paid for the policy (see letter dated August 2, 1898, p 23, produced and offered in evidence at the trial by the Grandview Building Association), and the jury found in the following words that the defendant tendered a return of the premium paid upon the policy in suit (19):

"Finding 10. Did the defendant tender a return of the premium paid upon the policy in suit? If so, when and what amount?

Answer. Yes; on August 4, 1898, in the sum of $33.75, being the amount of the premium paid for the policy, and the same was not accepted by the plaintiff."

There is no pretense that *the company* actually knew before the fire of the concurrent insurance.

Borgelt testified (25) that "at the time he wrote that policy he had no notice or knowledge that there was other insurance upon the property covered by the policy in suit and the first time he knew of any other insurance was after the fire. * * * The witness dealt with Mr. Walsh and Mr. Walsh didn't say anything to him about any other insurance."

The record further says:

"On redirect examination the witness testified that he has no recollection of having known anything about the other insurance until after the fire."

There are courts which now and then have lent an ear to considerations like those suggested by counsel, and he has probably been thus encouraged to predicate his prayer for an affirmance by an appeal to those considerations which can have no force in this court.

A brief reference to a very few of the cases cited

in behalf of the defendant which are claimed to sustain the contention of its counsel is deemed proper.

In *Commercial Union Assur. Co. v. Norwood*, 57 Kan., 610, 47 Pac., 529, cited originally by petitioner and claimed by defendant to sustain its contention, it is stated:

"*The pleadings, evidence and instructions in this case squarely present the question whether a prior parol agreement, made with the general agent of an insurance company, concerning the amount of concurrent insurance to be carried on the property insured, controls and defeats the express terms of the policy.* It appears without dispute, that one of the conditions of the policy was that it should be void if the insured should procure any other insurance on the property without the consent of the insurer, and that consent was endorsed on the policy for $32,500 only, of concurrent insurance. The prior parol agreement with Ormandy, with reference to the total amount of insurance to be carried on the property, and the fact that the plaintiffs had neglected to read the policy before the fire, are alone relied on to avoid the condition above mentioned. *There is no more wholesome or well-settled rule of law than that parol evidence of prior or contemporaneous conversations, and oral agreements, is inadmissible to contradict or vary the terms of a written contract.*"

In *Kalmutz v. Insurance Company*, 186 Pa. St., 575, 40 Atl., 816, the facts were that the policy was issued in April, 1894, and the defendant company's secretary, testified that he had notice of the additional insurance on the first Wednesday of November following. The court say:

"Notwithstanding the notice to the company, the policy was neither recalled nor canceled, and premiums or assessments collected were not returned, nor was any effort made to return the premium note

given by plaintiff, binding him to pay the premiums at such times and in such manner as the company's directors might by law require."

Upon these facts the court held that the company was estopped to insist upon the provision of its policy avoiding it for other insurance not consented to by endorsement upon the policy. And it is in connection with these facts that the decision must be considered. The mere statement in an opinion, of an abstract proposition is of little value unless it has pertinency and relevancy to the facts in the case. And upon the facts in the case now cited, the court quote the following language of Mr. Justice SHARSWOOD from his opinion in *Elliott v. Insurance Co.*, 66 Pa. St.. 26.

"Undoubtedly, if the company, *after notice or knowledge*, of the over-insurance, *treated the contract as subsisting*, by making and collecting assessments under it from the insured, they could not afterwards set up its forfeiture. *It would be an estoppel, which is the true ground upon which the doctrine of waiver in such cases rests.*"

It is insisted that the rule in Wisconsin is as stated in *Bourgeois v. Insurance Co.*, 86 Wis., 606, 57 N. W., 347, cited in the original brief of petitioner, and in *Straker v. Phenix Insurance Company*, 101 Wis., 413, 77 N. W.,, 752. The case last cited was grounded upon the statute prescribing the terms of the Wisconsin standard policy, which provides:

"No officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto."

And of this the court say:

"In *Bourgeois v. Insurance Co., supra*, it was held that

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there could be no such waiver by parol. True, the act there construed was subsequently declared unconstitutional, upon a question not here involved. But the construction put upon that act is applicable to similar language in the present act."

Petitioner frankly admits that a number of state courts have decided the question involved in this suit in disregard of the doctrines of the *Carpenter* case (16 Pet., 495), and in disregard of the rules of evidence which the same courts apply and enforce with regard to other contracts. Hence, it is not improper to ascribe, to those courts who have stripped from the insurance policy one after another of its provisions, the conception, that an insurance policy is a promissory note payable in case of fire.

Those courts have discriminated against insurance companies in the construction of their contracts, and have refused the application of rules of law, by which rights under other classes of contracts are universally protected, and petitioner has the right to, and does complain because thereof. But this court has ever stood a bulwark against all such assaults upon the sacredness of contract obligations, and your Honors, speaking through the late Mr. Justice FIELD, in *New York Life Ins. Co. v. Fletcher*, , 117 U. S., 519, say:

"Contracts could not be made or business fairly conducted, if such a rule (under which a party to a contract might be allowed to show that he did not know what it contained) should prevail; and there is no reason why it should be applied *merely* to contracts of insurance. There is nothing in their nature which distinguishes them in this particular from others."

And the learned Justice made the following further observation, which may be very pertinently offered as

a complete answer to counsel or courts who misconceive the doctrine of *Insurance Co. v. Wilkinson*, 13 Wall., 222, to apply in cases like that at bar; distinguishing *Insurance Company v. Wilkinson*, *supra*, and *Insurance Company v. Mahone*, 21 Wall., 152, he says:

> "In neither of these cases was *any limitation upon the power of the agent brought to the notice of the assured.* * * * The court held that the powers of the agent are *prima facie* coextensive with the business entrusted to his care, and would not be narrowed by limitations not communicated to the person with whom he dealt. Where such agents, not limited in their authority, undertake to prepare applications and take down answers, they will be deemed as acting for the companies. In such cases it may well be held that the description of the risk, although nominally proceeding from the assured, should be regarded as the act of the company. Nothing in these views has any bearing on the present case. Here the power of the agent was limited, and notice of such limitation given by being embodied in the application, and notice of such limitation given by being embodied in the application, which the assured was required to make and sign, and which as we have stated, he must be presumed to have read. He is, therefore, bound by its statements."

The difficulty with the question under consideration may be thus stated: Courts supporting the contention of adverse counsel in the case at bar, including the majority of the circuit court of appeals for the eighth circuit, misapply the doctrines of waiver and estoppel. The word "misapply" is used in lieu of a better one. The doctrines of waiver and estoppel have no application in this class of cases. *The question in them all, including the case at bar, is one of agency*: the right of companies to limit the powers of their agents: and

whether notice of the limitations upon those powers is given to the purchaser of an insurance policy, by its terms. And it is therefore submitted that the question for your Honors to determine, is whether the resident agent of the Northern Assurance Company at Lincoln, Nebraska, had any authority to issue such a policy as the Grand View Building Association, in effect, claims the policy in suit to be. For, if it were possible to conceive that the provision of the policy that it should be void in the event of other insurance not consented to by endorsement thereon, or added thereto, *could be waived, in advance of its execution and delivery, by an oral understanding with the agent, or through information conveyed to him*, of the fact of the other insurance, the insured was immediately notified upon the instant that the policy came to his hands, that the company had not authorized the agent to make any such contract. There was one way, *and one only*, by which the agent of the Northern Assurance Company, was authorized to make a contract with the Grand View Building Association, for insurance upon property which was already insured to the extent of $1500; and that one way was by endorsing consent to the other insurance upon the policy in suit. The reason for such requirement is stated in numerous cases already cited. (See petitioner's original brief pp. 25, 39 inc.)

"The company, which has seen fit to prescribe that the terms and conditions of its policy shall only be waived by its written or printed assent, has prescribed only a reasonable rule to guard against the uncertain ties of oral evidence, and by this the insured has assented to be bound."

Kyte v. Assurance Company, 144 Mass., 43, 10 N. E. 518.

Here, then, is the attitude of this case: A suit at

law is brought upon a policy of insurance; the policy as received from the agent is produced and offered in evidence by the insured, which avers both in its petition, anticipating the defense of the company, and in its reply, in an attempt to avoid it, that the policy which it sued upon and produced in evidence, *is not in fact, the policy which it bought from the company*. The company interposes its defense of a breach of the identical provision which the insured insists should be read out of the policy.

Will your Honors say that this is a case which calls for a departure from principles promulgated from this bench for more than a century? Would it not be the orderly mode of procedure for the insured to go into a court of equity and there seek a reformation of its contract?

The argument of counsel that the Federal courts ought not to make any distinction between causes at law and equity because the legislature of Nebraska has undertaken to abolish that distinction, is utterly untenable. *In Gravenberg v. Laws*, 100 Fed., 1, 4, the doctrine is thus stated:

"In *Sims' Lessee v. Irvine*, 3 Dall., 464, Mr. Justice IREDELL said:

'It is of infinite moment, in my opinion, that principles of law and equity should not be confounded, otherwise inextricable confusion will arise. Neither will be properly understood, and, instead of both being administered with useful guards which the policy of each system has devised against abuse, a heterogeneous mass of principles not intended to assort with each other will be blended together, and the substance of justice will soon follow the forms calculated to secure it.'

Whatever may be thought of this observation, when

most of the states have blended by Code procedure equitable and legal remedies, the federal courts are required to observe in their procedure the distinction between legal and equitable rights and remedies. In *Bennett v. Butterworth*, 11 How. 674, Chief Justice TANEY, delivering the opinion of the court, said:

'The constitution of the United States, in creating and defining the judicial power of the general government, establishes this distinction between law and equity; and a party who claims a legal title must proceed at law, and may undoubtedly proceed according to the forms of practice in such cases in the state court. But if the claim is an equitable one, he must proceed according to rules which this court has prescribed regulating proceedings in equity in the courts of the United States.'

It is settled beyond all controversy that under the constitution and laws of the United States the distinction between common law and equity must be maintained in the federal courts, although both jurisdictions are vested in the same courts. *Fitts v. McGhee*, 172 U. S., 516, 531, 19 Sup. Ct. 269; *Hurt v. Hollingsworth*, 100 U. S. 100."

Our reinvestigation of the case, following the reading of defendant's brief, confirms the conviction that your Honors should hold strictly in accordance with underlying and fundamental principles, and call back subordinate courts which have departed therefrom; for there is danger in departures from and modifications of principles,—danger that the whole body of legal principles will be changed and subverted. The wisdom of courts during centuries of jurisprudence by which rules regulating the introduction of evidence have been formulated, has given stability to legal procedure which has commanded the respect and reverence of the people; but courts which have departed

from "the old paths, where is the good way" are likely to become in time as unreliable and as unsatisfactory as political conventions.

Respectfully submitted,

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OMAHA, April 10th, 1901.